SUPREME COURT, U. S.

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In the Supreme Court of the United States

No. 74-984

October Term, 1974

VIRGINIA MAVER,
Petitioner,

vs.

EDWARD J. LOESCH, JOHN D. KORINEK,
CITY OF UNIVERSITY HEIGHTS, OHIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OMISSIONS

Respondents accept petitioner's statements of "Opinions Below," "Jurisdiction," and "Statutes Involved" and therefore omits them.

QUESTIONS PRESENTED

1. Where a duly issued search warrant is executed within its scope by a municipal official, may the owner of the property searched establish a cause of action by a bare allegation that a Court erred in the issuance of the warrant?

A. Does such allegation establish jurisdiction under 28 U.S.C. §1343 against the official executing the warrant?

B. Does such allegation create jurisdiction under 28 U.S.C. §1331 for the vicarious liability of the official's employer and supervisor?

C. Does jurisdiction attach as the result of a common law Fourth Amendment violation?

2. Does *Scheuer v. Rhodes* so restrict the ability of a Court to dismiss a case as to be inconsistent with the facts and allegations of this case?

STATEMENT OF FACTS

Except as noted herein, respondents either accept petitioner's statement of facts or consider deviations to be inconsequential.

Respondent Edward J. Loesch obtained a search warrant for the property in question after a City Building Inspector had been refused entry in the ordinary course of a systematic area-wide housing inspection program. The affidavit on which it was based contained no false statements of fact, nor does petitioner claim such to be the case. The scope of the search was well within the authorization of the warrant. No more force was used by the Police officer in restraining the petitioner during the search than was necessary to keep her from attacking or otherwise interfering with the Building Inspector.

Claiming that the facts stated in the search warrant affidavit did not state sufficient cause of its issuance, petitioner demanded both actual and punitive damages in her civil action.

ARGUMENT FOR DENIAL OF PETITION

I. The Decision of the District Court As Affirmed by the Circuit Court Was Correct

Judge Green of the District Court (see Opinion Below, Petition, p. 43) correctly identifies the incident giving rise to petitioner's claim as an improper challenge by petitioner to respondents' legal authority to enter under authority of a prima facie valid search warrant.

Judge Green's opinion referred to the search warrant held by respondent Korinek by the explanatory terms "apparent legal authority," "*prima facie* valid," and "facially valid claim of right" (Petition, pp. 46, 47). His descriptions were apt in light of the legal presumption of validity of a duly issued warrant not obtained by fraud or other such conduct on the part of the officer seeking the warrant's authority. Impliedly, then, he rejected the contention that the executing officer had a responsibility to independently question the issuing Judge's wisdom. Without that contention the cause of action topples.

Petitioner claims that it is respondents' burden to show facts justifying the Municipal Court Judge's issuance of the warrant (Petition, p. 13). There is no such burden. Discretion to decide sufficiency of probable cause belongs solely to the Judge who issues the warrant. His purpose is to review the standard of probable cause so that each officer of the government does not operate on the basis of his own concept thereof. By alleging that an inspector acting under warrant duly issued has the responsibility of passing on its sufficiency himself, petitioner obviates the protective function of the warrant. According to *Brinkman v. Drolesbaugh*, 97 Ohio St. 171, 119 N.E. 451

(1918) an officer working under a warrant duly issued is forbidden from assessing its sufficiency.

> "If the acts complained of be made an offense under the law, and the Court have jurisdiction of such offense, and the process be regular upon its face, it becomes the officer's sworn duty to serve the same and make a return thereon; . . ."

Beyond this, petitioner states no claim on which relief can be granted. Petitioner attempts to *create* a cause that does not exist by bringing in statutory and common law cases which have no reasonable relationship to the facts or issues of the instant case.

In *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 1213 (1961) and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683 (1974), petitioners alleged an abuse, by way of overstepping the limits of authority. Mrs. Maver claims no abuse other than that the Municipal Court should not have issued a warrant and, therefore, respondents should not have executed it. Korinek could not, under petitioner's allegations, be liable *as a matter of law*, even if all facts alleged proved to be true.

Since the case against respondents Loesch and the City of University Heights is based on *respondeat superior*, they must be dismissed if the actual actor is not liable. Whether or not a City can be sued under 28 U.S.C. §1331 is not a valid argument against dismissal, for regardless of the answer, there is still no actionable fact on which vicarious liability will lie.

II. Scheuer v. Rhodes Does Not Restrict the District Court from Dismissing the Instant Case

The *Scheuer* opinion, at 416 U.S. 232, 236, adopted *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957), in its statement:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Petitioner's interpretation of this would make it virtually impossible for any Court to ever again dismiss a case prior to trial. Petitioner's interpretation is erroneous in two regards:

> A. Whether the search warrant affidavit states probable cause is a question of law, not fact.
>
> B. The phrase "no set of facts" must be limited to facts stated or suggested by the Complaint.

As to the first error in interpretation, petitioner wishes to be able to prove that the facts stated in the search warrant affidavit did not constitute probable cause for a search. She does not challenge the facts themselves but rather the legal conclusion reached by the Municipal Court in applying these facts. That legal conclusion is not itself a "fact" within the meaning of *Conley* or *Scheuer*, and does not exempt the ensuing civil damage action from dismissal if the District Court, *as a matter of law*, rejects petitioner's contentions in regard thereto.

Petitioner's second interpretive error would have her allowed to go to trial to prove "the malicious, reckless

and wanton character of the individual respondent's invasion". . . . (Petition, p. 16). And yet, not one *fact* is alleged in the complaint to support or even suggest such a conclusion.

Admittedly we are in an era of simplified pleading and we further require that amendments to pleadings be liberally allowed to conform to the evidence adduced at trial, that substantial justice may be done. Does *Scheuer* require that trial take place on the off-chance that some evidence not even suggested by pleading will come forth to save the day? If so, *Scheuer* prevents any case from ever being dismissed until after every shred of evidence is in.

In *Scheuer*, there was a definite contention that defendants, having discretion to deploy the National Guard, intentionally abused that discretion. Defendants were dismissed as being protected by the Eleventh Amendment and by absolute immunity. This Court remanded on the basis that the Eleventh Amendment did not apply and that immunity was not absolute but qualified. The facts suggested by the complaint would therefore have to be considered before a Court could properly rule on the immunity question. But it is absurd to believe that this Court would have remanded in the complete absence of the suggestion of those facts.

The instant case is easily and immediately distinguishable in that there is no suggestion that respondent Korinek went beyond the authority of the warrant, assuming as a matter of law that the authority was bestowed on him. No set of facts could bestow discretion upon him and he could not, therefore, under any set of facts, abuse discretion.

CONCLUSION

The District Court rejected petitioner's legal assumptions. Having done so, the facts became irrelevant and immaterial and continuance of the case would have served no plausible useful purpose. The Order of Dismissal was then essential to the interests of justice and should be allowed to stand.

Certiorari will accomplish nothing and should be refused.

Respectfully submitted,

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